Dr Milton Lum Siew Wah v Majlis Perubatan Malaysia

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–117–04 OF 2017
NORDIN HASSAN J
8 MAY 2019

Statutory Interpretation — Definitions — Whether Malaysian Medical Council ('MMC') an 'enforcement agency' under Whistleblower Protection Act 2010 ('WPA') — Medical Act 1971 did not confer investigation and enforcement powers/functions on MMC apart from power to investigate disciplinary matters concerning its members – MMC was merely a regulatory/disciplinary body for medical practitioners and not an enforcement agency as defined under the WPA

The applicant, who had a medical practice in a private hospital ('Assunta'), complained to the respondent ('MMC') that another doctor at the hospital ('Dr Lourdes') had breached patient confidentiality by allowing their private medical records to be seen by others. The MMC investigated the complaint, decided that there was no case against Dr Lourdes and informed the applicant of its decision. The applicant applied for judicial review of the decision but the High Court dismissed it on the ground the MMC's decision was not amenable to judicial review. However, on appeal, the Court of Appeal set aside the High Court's decision and ordered the MMC to find Dr Lourdes guilty and impose the appropriate punishment. The MMC found Dr Lourdes guilty of breaching patient confidentiality and reprimanded him under s 30(iii) of the Medical Act 1971. Dr Lourdes' appeal to the High Court against the MMC's decision was dismissed. Thereafter, thinking that Assunta had terminated his contract with the hospital because of his complaint against Dr Lourdes, the applicant requested the MMC to take action against Assunta under s 15(1) of the Whistleblower Protection Act 2010 ('the WPA') for causing him to 'suffer detrimental action in reprisal for his disclosure of improper conduct' to the MMC. The MMC informed the applicant ('the impugned decision') that it had no jurisdiction to act on his request. The applicant filed the instant judicial review against the impugned decision for, inter alia: (a) a declaration that the MMC was an 'enforcement agency' within the meaning of s 2 of the WPA; (b) a declaration that the impugned decision was null and void for breaching s 3 of the WPA; (c) an order of certiorari to quash the impugned decision on the ground it was irrational, unfair, unjust and/or unreasonable; and (d) an order of mandamus directing the MMC to take action against Assunta on the applicant's behalf under s 15(1) of the WPA for damages or any other relief that the court deemed fit and just.

Held, dismissing the application:

(1) Section 2 of the WPA defined 'enforcement agency' as a body which was conferred with 'investigation and enforcement functions by any written law or having investigation and enforcement powers'. A perusal of the Medical Act 1971 (under which the MMC was established) and its regulations showed that the MMC did not have any investigation and enforcement functions or powers to qualify as an 'enforcement agency' under the WPA. The MMC was merely a regulatory body for medical practitioners and exercised disciplinary jurisdiction over its members just as how the Bar Council was a disciplinary authority for lawyers and was not an enforcement agency as defined under s 2 of the WPA. The investigation powers of the MMC was only with regard to disciplinary matters under the Medical Act 1971 (see paras 7–8, 15–16, 18 and 21).

(2) The applicant's complaint against Dr Lourdes was made before the WPA came into force. Hence, when he made the complaint, the applicant was clearly not a whistleblower under the WPA. Consequently, there was no 'disclosure of improper conduct to the enforcement agency under s 6 by the applicant. The applicant's complaint against Dr Lourdes was clearly under the Medical Act 1971 and the Regulations of 1974 and the MMC had already acted on the complaint (see paras 27–28).

(3) Since the applicant was not a whistleblower under the WPA and the MMC was not an enforcement agency as defined under s 2 of the WPA, s 15(1) of the WPA had no application and the applicant could not seek relief under that provision. The applicant had no basis to seek an order of mandamus as he did not have any legal rights under the WPA, in particular s 15(1), and the MMC had no duty to act under the WPA (see paras 30–31).

[Bahasa Malaysia summary

Pemohon, yang mempunyai amalan perubatan di sebuah hospital swasta ('Assunta'), telah mengadu kepada responden ('MMC') bahawa seorang lagi doktor di hospital itu ('Dr Lourdes') telah melanggar kerahsiaan pesakit dengan membenarkan rekod perubatan swasta dilihat oleh orang lain. MMC telah menyiasat pengadu, dan memutuskan bahawa tiada kes terhadap Dr Lourdes dan memaklumkan pemohon tentang keputusannya. Pemohon telah memohon untuk semakan kehakiman terhadap keputusan itu tetapi Mahkamah Tinggi telah menolaknya atas alasan keputusan MMC tidak boleh menerima semakan kehakiman. Walau bagaimanapun, atas rayuan, Mahkamah Rayuan telah mengetepikan keputusan Mahkamah Tinggi dan memerintahkan MMC agar mendapati Dr Lourdes bersalah dan mengenakan hukuman yang bersesuaian. MMC mendapati Dr Lourdes bersalah kerana melanggar kerahsiaan pesakit dan memberi amaran kepadanya di bawah s 30(iii) Akta Perubatan 1971. Rayuan Dr Lourdes kepada Mahkamah Tinggi terhadap keputusan MMC telah ditolak. Berikutan itu, memikirkan bahawa Assunta telah menamatkan kontraknya dengan hospital kerana aduannya

terhadap Dr Lourdes, pemohon memohon MMC mengambil tindakan terhadap Assunta di bawah s 15(1) Akta Perlindungan Pemberi Maklumat 2010 ('APPM') kerana mengakibatkannya 'suffer detrimental action in reprisal for his disclosure of improper conduct' kepada MMC. MMC memberitahu pemohon ('keputusan yang dipersoalkan') bahawa ia tiada bidang kuasa untuk bertindak atas permohonannya. Pemohon telah memfailkan semakan kehakiman ini terhadap keputusan yang dipersoalkan untuk, antara lain: (a) suatu deklarasi bahawa MMC adalah 'enforcement agency' dalam maksud s 2 APPM; (b) suatu deklarasi bahawa keputusan yang dipersoalkan adalah terbatal dan tidak sah kerana melanggar s 3 APPM; (c) suatu perintah certiorari untuk membatalkan keputusan yang dipersoalkan atas alasan ia tidak rasional, tidak adil, tidak saksama dan/atau tidak munasabah; dan (d) suatu perintah mandamus mengarahkan MMC mengambil tindakan terhadap Assunta bagi pihak pemohon di bawah s 15(1) APPM untuk ganti rugi atau apa-apa relief lain yang dianggap sesuai dan adil oleh mahkamah.

Diputuskan, menolak permohonan:

(1) Seksyen 2 APPM mentafsirkan 'enforcement agency' sebagai satu badan yang diberikan 'investigation and enforcement functions by any written law or having investigation and enforcement powers'. Penelitian kepada Akta Perubatan 1971 (di bawah mana MMC ditubuhkan) dan Peraturan-Peraturannya menunjukkan bahawa MMC tidak mempunyai fungsi atau kuasa siasatan dan penguatkuasaan untuk memenuhi syarat sebagai suatu 'enforcement agency' di bawah APPM. MMC hanya badan pengawal selia untuk pengamal perubatan dan melaksanakan bidang kuasa tatatertib ke atas ahli-ahlinya sama seperti Majlis Peguam adalah badan berkuasa tatatertib untuk peguam dan bukan agensi penguatkuasaan sepertimana ditafsirkan di bawah s 2 APPM. Kuasa siasatan MMC hanya berkenaan perkara-perkara tatatertib di bawah Akta Perubatan 1971 (lihat perenggan 7–8, 15–16, 18, & 21).

(2) Aduan pemohon terhadap Dr Lourdes telah dibuat sebelum APPM berkuat kuasa. Justeru, apabila dia membuat aduan itu, pemohon jelas bukan pemberi maklumat di bawah APPM. Berikutan itu, tiada 'disclosure of improper conduct to the enforcement agency under s 6 oleh pemohon. Aduan pemohon terhadap Dr Lourdes jelas di bawah Akta Perubatan 1971 dan Peraturan-Peraturan 1974 dan MMC telah pun bertindak atas aduan itu (lihat perenggan 27–28).

(3) Oleh kerana pemohon bukan pemberi maklumat di bawah APPM dan MMC bukan agensi penguatkuasaan sepertimana ditafsirkan di bawah s 2 APPM, s 15(1) APPM tiada permohonan dan pemohon tidak boleh memohon relief di bawah peruntukan tersebut. Pemohon tiada asas untuk memohon perintah mandamus kerana dia tidak mempunyai apa-apa hak undang-undang di bawah APPM, terutamanya s 15(1), dan

A MMC tiada kewajipan untuk bertindak di bawah APPM (lihat perenggan 30–31).]

Cases referred to

B *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443, FC (refd)

Peguam Negara Malaysia v Dr Micheal Jayakumar Devaraj [2012] 1 MLJ 179; [2011] 9 CLJ 645, CA (refd)

C **Legislation referred to**

Courts of Judicature Act 1964 Schedule, para 1
Medical Act 1971 ss 29(2)(b), 30(iii)
Medical Regulations 1974 regs 26(1), 29, 30, 31
D Rules of the High Court 1980 (revoked by the Rules of Court 2012) O 53
Specific Relief Act 1950 s 44
Universities and University Colleges Act 1971
Whilstleblower Protection Act 2010 ss 2, 3(1), 6, 12, 13(1)(b), 14(2)(b), 15(1), 29, 29(2), 30, 44

E *Kamraj Nayagam (Maya Gayathri with him)(Mah-Kamariyah & Philip Koh) for the applicant.*

Jessica Ram Binwani (Ramitra Ramarao with her) (Kanesh Sundrum & Co) for the respondent.

F **Nordin Hassan J:**

INTRODUCTION

G **[1]** The applicant filed a judicial review application seeking inter alia the following reliefs:

(a) a declaration that the respondent is an 'enforcement agency' within the meaning of s 2 of the Whilstleblower Protection Act 2010 ('the WPA 2010');

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(b) further or in the alternative, a declaration that the respondent's refusal and/or failure to accede to the applicant's request of 23 August 2016, which refusal was communicated to the applicant by way of letter dated 23 January 2017, is in breach of s 3 of the WPA 2010 and on that account is null and void;

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(c) further or in the alternative, an order for certiorari quashing the respondent's decision of 23 January 2017 that it is not an enforcement agency within the meaning of s 2 of the WPA 2010 and is thus nor in a position to take action as requested as the matter is beyond its

jurisdiction, which was made unfairly, unjustly and/or unreasonably; and

(d) further or in the alternative, a mandatory order or mandamus directing the respondent to act on behalf of the applicant by bringing an action against Assunta Hospital under s 15(1) of the WPA 2010 for damages or compensation, or any other relief that the court deems fit and just.

THE SALIENT FACTS

[2] The relevant facts in this application are as follows:

(a) the applicant is a medical practitioner registered under the Medical Act 1971 and was a visiting consultant obstetrician and gynaecologist at Assunta Hospital Petaling Jaya from 1994 to 2001;

(b) in 2009, the applicant received confidential medical records which are clinical summaries and particulars of deceased patients of Assunta Hospital circulated by Dr Lourdes Dava Raj a/l Curuz Duraj Raj, the person in charge of Assunta Hospital;

(c) the applicant then filed a complaint against Dr Lourdes for breach of confidentiality by letter dated 31 December 2009 to the respondent. The complaint was lodged pursuant to the Medical Regulations 1974;

(d) meanwhile, the applicant's contract as visiting consultant obstetrician and gynaecologist was terminated by Assunta Hospital by letter of termination dated 10 February 2011;

(e) dissatisfied with the said termination of contract, the applicant filed a civil suit against Assunta Hospital for breach of contract and inter alia contends that the termination was because of the applicant's complaint against Dr Lourdes;

(f) the applicant's claim against Assunta Hospital was allowed by the High Court but on appeal, the Court of Appeal on 18 July 2012 had set aside the High Court's decision. Thereafter, on 21 January 2014 the applicant's motion for leave to appeal to the Federal Court was dismissed;

(g) as regards the applicant's complaint against Dr Lourdes, having inquired into the said complaint, on 20 May 2014 the respondent decided that no case has been established against Dr Lourdes and this decision was informed to Dr Lourdes by letter dated 12 June 2014;

(h) the applicant then filed an application for judicial review inter alia for an order of certiorari to quash the said respondent's decision. However, on 8 May 2015 the High Court decided that the respondent's decision was not amenable to judicial review and dismissed the application;

(i) on appeal, the Court of Appeal set aside the High Court's decision and ordered the respondent to find Dr Lourdes guilty and to hear his mitigation and impose the appropriate punishment;

(j) further inquiry was then conducted by the respondent and on 21 June 2016, the respondent found Dr Lourdes guilty of infamous conduct under sub-s 29(2)(b) of the Medical Act 1971 for breach of confidentiality. The respondent then reprimand Dr Lourdes pursuant to s 30(iii) of the same Act;

(k) the appeal by Dr Lourdes to the High Court against the respondent's decision was dismissed;

(l) next, by letter dated 23 August 2016, the applicant wrote to the respondent to take action against Assunta Hospital under s 15(1) WPA 2010 as a result of the applicant having suffered detrimental action in reprisal for his disclosure to the respondent; and

(m) in response, the respondent by letter dated 23 January 2017, informed the applicant that the respondent could not accede to the applicant's request as it is beyond the respondent's jurisdiction. Hence, the present judicial review application by the applicant.

THE GROUNDS FOR THE JUDICIAL REVIEW APPLICATION

[3] The applicant's grounds for the judicial review application can be summarised as follows:

(a) the respondent's decision vide letter 23 January 2017 is irrational, unreasonable and or in contravention of the WPA 2010 inter alia for:

(i) failing to recognise itself as an 'enforcement agency' within the meaning of 'enforcement agency' under s 2 of the WPA 2010; and

(ii) failing to seek court remedies on behalf of the applicant as it is empowered to do under s 15(1) of the WPA 2010 as an enforcement agency.

Findings of this court

[4] It is trite law that a decision is relation to a public duty or function including the Minister's decision in the present application is subject to a judicial review on the grounds of illegality, irrationality and procedure impropriety. The decision may be reviewed not only on its decision making process but also its substance.

[5] In a recent Federal Court case of *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng*

Thuan) and another appeal [2019] 3 MLJ 443, it states the following:

> [60] This landmark decision moved the courts from a position of deciding whether prerogative power existed to deciding if they were being carried out lawfully. Lord Diplock in his speech at p 401D of the *GCHQ case* enunciated three classic grounds for judicial review:
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> *Judicial review has I think developed to a stage today when … one can conveniently classify under heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality'. The second 'irrationality' and the third 'procedural impropriety' …*
>
> *By 'illegality' as a ground for Judicial Review, I mean that the decision-maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.*
>
> *By 'irrationality', I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'* (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.
>
> I have described the third head as *'procedural impropriety'* rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decisions. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that the expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.'

[6] In the present application, the core issue here is whether the respondent is an enforcement agency within the definition of enforcement agency under s 2 of the WPA 2010.

[7] Section 2 of the WPA 2010 defined enforcement agency as follows:

> *'enforcement agency'* means—
>
> (a) any ministry, department, agency or other body set up by the Federal Government, State Government or local government including a unit, section, division, department or agency of such ministry, department, agency or body, conferred with *investigation and enforcement functions by any written law or having investigation and enforcement powers*;
>
> (b) a body established by a Federal Law or State law which is conferred with investigation and enforcement functions by that Federal law or State law or any other written law; or
>
> (c) a unit, section, division, department or agency of a body established by a Federal law or State law having investigation or enforcement functions;

[8] In the present case, subsection 2(a) is the relevant provision and the key words in this provision is ' ... conferred with *investigation and enforcement functions* by any written law or *having investigation and enforcement powers*'.

[9] In this regard, the main consideration here is whether the respondent has the investigation and enforcement functions or powers under the law.

[10] To determine this issue, reference to relevant provisions of the Medical Act 1971 ('the Act') and its regulations are pertinent.

[11] Firstly, respondent is a body corporate which consist of members as stipulated under s 3(1)of the Act which are as follows:

Section 3(1):

3 (1) A body corporate with prepetual succession and a common seal to be called the Malaysian Medical Council is established which shall consist of—

(a) *the Director General*;

(b) *three fully registered practitioners* from among the members of the Faculty of Medicine or the staff of the Medical Centre of the University of Malaya to be nominated by the Council of the University of Malaya and appointed by the Minister;

(c) *three fully registered practitioners* from each of the Faculties of Medicine of the other Universities established under the Universities and University Colleges Act 1971 (Act 30) , to be nominated from among the members of the Faculty by the Council of the respective University and appointed by the Minister;

(d) *nine fully rregistered practitioners* resident in Peninsular Malaysia to be elected by the fully registered practitioners resident in Peninsular Malaysia

(e) *one fully registered practitioner* resident in Sabah to be elected by the fully registered practitioners resident in Sabah;

(f) *one fully registered pratitioner* resident in Sarawak to be elected by the fully registered practitioners resident in Sarawak; and

(g) *three fully registered practitioners* from the public services to be appointed by the Minister.

[12] The respondent has the disciplinary jurisdiction over its members and to imposed disciplinary punishment as spelt out under ss 29–30 of the Act which are the following:

(a) *Section 29*

29 Disciplinary jurisdiction of the Council.

(1) The Council shall have disciplinary jurisdiction over all persons registered under this Act.

(2) The Council may exercise disciplinary jurisdiction over any registered person who—

(b) has been convicted in Malaysia or elsewhere of any offence punishable with imprisonment (whether in itself only or in addition to or in lieu of a fine).

(c) *has been guilty of infamous conduct in any professional respect;*

(d) has obtained registration by fraud or misrepresentation;

(e) was not at the time of his registration entitled to be registered; or

(f) has since been removed from the register of medical practitioner maintained in any place outside Malaysia.

(a) *Section 30*

30 Disciplinary punishments.

The Council may, in the exercise of its disciplinary jurisdiction, impose any of the following punishments—

(i) order the name of such registered person to be struck off from the Register; or

(ii) order the name of such regisgtered person to be suspended from the Register for such period as it may think fit; or

(iii) order the registered person to be reprimanded; or

(iv) make any such order as aforesaid but suspend the application thereof, subject to such conditions as the Council may think fit, for a period, or periods in the aggregate, not exceeding two years;

and may, in any case, make such order as the Council thinks fit with regard to the payment of the costs of the Registrar and of any complainant or of the registered person, and any costs awarded may be recovered as a civil debt.

[13] Further, in dealing with any complaint or information in relation to any disciplinary matter, an Investigation Committee may be formed pursuant to reg 26(1) of the Medical Regulations 1974('the regulations') to carry out an investigation.

[14] Next, the procedure for the inquiry is provided under regs 29, 30 and 31 of the regulations and for ease of reference, are as follows :

(i) *Regulation 29*

20 Procedure for Inquiry.

(1) Where the Committee has reason to believe that the complaint or

information is probably true, it shall—

(a) by order in writing require the attendance before the Committee, on a date and time and at a place to be specified therein, of the complainant and any person who from the complaint or information given otherwise appears to be acquainted with the circumstances;

(b) inform the practitioner against whom the allegations are made, the substance of the complaint or information, the date, time and place at which the inquiry into the complaint or information shall be made and of his rights to be present with or without counsel, to cross-examine such persons who may be called at the inquiry.

(2) The Committee shall convene on the date, time and place specified in the order and shall proceed to inquire into the allegation into the allegation made against the practitioner.

(3) The Committee shall examine the complainant and the persons in support of the allegation, who may in turn be cross- examined for the practitioner and if necessary re-examined and shall reduce to writing the satatement made by the complainant and such persons examined.

(4) After taking the statements of the complainant and the persons in support of the allegation, the Committee shall—

(a) if it finds that there are not sufficient grounds to support the allegation, recommend to the Council that no action be taken; or

(b) if it finds that the statements support the allegation, frame the charge and explain to the practitioner hat he is at liberty to state his defence on the charge fram gainst him.

(5) If the practitioner after being informed of his right under sub-regulation (4) elects not to make a statement the committee shall recommend that there shall be an inquiry by the Council.

(6) If the practitioner elects to make his defence before the Committee, the Committee shall record his statement as far as possible, word for word.

(7) After taking the practitioner's statement, the Committee shall—

(a) if it finds that there are not sufficient grounds to support the charge, recommend to the Council that no action be taken; or

(b) if it finds that there are grounds to support the charge, recommend to the Council that there shall be an inquiry by the Council.

(ii) *Regulation 30.*

30 Records of inquiry to be transmitted to the Council.

The records of any preliminary inquiry by the Committee shall be prepared and sent to the Council within sixty days of completion of such inquiry.

(iii) *Regulation 31.*

31 Enquiry by the Council.

(1) The Council shall, where the Committee recommends that there shall be an inquiry, and may, for reasons to be recorded, in cases where the Committee, after hearing the statements of the complainants and other persons in support of the allegation has recommended that no action be taken, hold a disciplinary inquiry against the practitioner.

(2) The Council shall cause to be served on the practitioner a notice specifying the date, time and place of inquiry and shall provide such practitioner with a copy of the charge or charges framed by the Council after a consideration of the records submitted by the Committee.

(3) The Council shall not, on the date of the inquiry require any further statement to be recorded or made by the complainant or such persons who have made statements before the Committee;

Provided that it may call for and shall record any statement from any such person of it is of the opinion that it would be fair and just to do so.

(4) The Council shall, if after considering the statements made by the complainant and other persons in support of the allegation as found in the records of the preliminary inquiry by the Committee, it is satisfied that there are grounds to support the charge call upon the practitioner to make any further statement as he deems necessary and to call such other persons as he may require to support his defence and shall record such further statement or fresh statement.

(5) If at the close of the inquiry, the Council finds that no case has been made out against the practitioner it shall direct that the charge be dismissed and shall inform the practitioner accordingly.

(6) If at the close of the inquiry the Council finds the practitioner guilty of any disciplinary matter specified in section in s 29(2)of the Act , it shall inform the practitioner of its findings and the grounds for its decision and shall request such practitioner to make any plea in mitigation as he deems fit.

(7) The Council shall, after hearing any plea in mitigation, exercise any of its powers specified in s 30of the Act .

[15] Based on the abovementioned statutory provisions, it is clear that the respondent is a regulatory body for medical practitioners and has the disciplinary jurisdiction over its members. The respondent's disciplinary powers is in respect of matters as laid down under s 29(2) of the Act as alluded to earlier.

[16] The investigation powers of the respondent is with regard to the disciplinary matters under the act. The power to impose punishment under s 30 of the Act is also in relation to the disciplinary matters under s 29(2) of the Act.

[17] It is also an established fact that the applicant's complaint against Dr Lourdes in 2009 was investigated and taken action under the act and its regulations.

[18] Having perused the act and its regulations, I find, the respondent does not have any investigation and enforcement functions or powers to be categorised as an enforcement agency under the WPA 2010.

[19] The composition of members of the respondent as provided under section 3(1) of the Act clearly unable them to carry out the functions of an enforcement agency envisaged under the WPA 2010.

[20] To further support the finding that the respondent is not an enforcement agency, reference to parliamentary debate on the WPA Bill reported in Hansard dated 20 April 2010 at pp 96–97 is relevant, where the Deputy Minister at the Prime Minister Department, Datuk Liew Vui Keong inter alia explained as follows :

> Yang Berhormat Batu Gajah telah pun menyoal kenapa definisi agensi penguatkuasaan tidak diluaskan kepada agensi bukan (kerajaan) seperti Bar Council, union, dan juga lain-lain. Untuk makluman Yang Berhormat Batu Gajah bahawa definisi agensi penguatkuasaan ini tidak boleh diluaskan kepada agensi bukan kerajaan seperti Yang Berhormat katakan. lni kerana agensi tersebut tidak mempunyai kuasa untuk menyiasat. Yang Berhormat Batu Gajah juga bertanya apakah jaminan terhadap setiap pendedahan perlakuan tidak wajar akan disiasat secara profesional dan jawatan ini telah pun saya beri tadi bahawa semua penyiasatan akan dibuat dan agensi penguatkuasa tersebut denga profesionalisme dan juga dengan effectiveness untuk membuat siasatan yang lebih berobjektif itu dan ...

[21] The said Parliamentary debate on the WPA 2010 Bill has shown that Bar Council, a disciplinary authority for lawyers is not an enforcement agency as defined under s 2 of the WPA. As such, the respondent, a disciplinary authority for medical practitioners which its functions and duty is similar as the Bar Council is also not an enforcement agency under the WPA 2010.

[22] On the same issue, reference to the WPA 2010 will also shows that the respondent is not an enforcement agency as defined under s 2 of the said Act .

[23] As regards the complaint of improper conduct, s 13(1)(b) of the WPA 2010 provides as follows:

> *Finding of enforcement agency after investigation of improper conduct*
>
> 13(1) If the report under s 12 makes a finding that —
>
> (a) ...

(b) the improper conduct constitutes a disciplinary offence, *the enforcement agency shall make a recommendation to the appropriate disciplinary authority* or other appropriate authority in the case of a public body or to the employer or other appropriate person in the case of a private *body to initiate disciplinary proceedings* or to take such steps as it deems appropriate against the officer of the public body or the officer of the private body who had committed the improper conduct; or ...

[24] Section 13(1)(b) requires the enforcement agency to refer any improper conduct to a disciplinary committee to initiate disciplinary proceedings or other appropriate action.

[25] Likewise for complaints of detrimental action where the enforcement agency will make its recommendation to the disciplinary authority to initiate disciplinary proceedings or other appropriate action as provided under s 14(2)(b) of the WPA 2010.

[26] Sections 13(1)(b) and 14(2)(b) abovestated clearly show the different role of an enforcement agency and a disciplinary authority. The respondent in the present case, as a disciplinary authority with no enforcement function or power is not an enforcement agency. The contention that the respondent is an enforcement agency will make ss 13 and 14 redundant and of no effect.

[27] Further, the complaint by the applicant against Dr Lourdes was made on 31 December 2009 and in the applicant's Statutory Declaration dated 4 January 2010. The complaint was before the coming into force the WPA 2010 which was on 15 December 2010. In the circumstances, when the complaint was made by the applicant, he was clearly not a whistleblower under the WPA 2010. There was no disclosure of improper conduct under s 6 by the applicant as 'whistleblower' is defined under s 2 of the WPA 2010 as follows:

... any person who makes a disclosure of improper conduct to the enforcement agency under s 6.

[28] The applicant's complaint against Dr Lourdes was clearly under the Medical Act 1971 and Medical Regulations 1974 which has been dealt with by the respondent according to the said statutory provisions.

[29] The applicant now is seeking remedies from the court for detrimental action in reprisal for the disclosure of improper conduct pursuant to s 15(1) of the WPA 2010 which states:

15 (1) Upon request made *by a whistleblower*—

(a) Within three months after being informed by the enforcement agency under sub-s 14(6) that detrimental action in deprisal for a disclosure of improper conduct has been taken against him; or

(b) *At any time that the whistleblower fears that detrimental action in reprisal for a disclosure of improper conduct may be taken against him,*

the enforcement agency may seek gthe following remedies from the court:

(A) damages or compensation;

(B) injunction; or

(C) any other relief as the court deems fit.

[30] As has been found earlier that the applicant was not a whistleblower under the WPA 2010 and the respondent is not an enforcement agency as defined under s 2 of the same Act, the provision of s 15(1) is inapplicable. In the circumstances, the applicant's application for relief under the said provision is untenable.

[31] Consequently, the applicant has no basis to seek for an order of mandamus as the applicant does not has any legal rights under the WPA 2010 in particular s 15(1) and the respondent has no duty to act under the said WPA 2010.

[32] On this issue of mandamus, it is instructive to make reference to the Court of Appeal case of *Peguam Negara Malaysia v Dr Micheal Jayakumar Devaraj* [2012] 1 MLJ 179; [2011] 9 CLJ 645, which states the following:

[27] The law governing the grant or refusal of an order of mandamus is to be gathered from three pieces of legislation. More specifically, the relevant provisions are contained in:

(1) Section 44;

(2) Para 1 of the Schedule to the Courts of Judicature Act 1964 ('the Schedule'); and

(3) Order 53.

(see eg, *Hong Leong Equipment*).

[33] Further, at *para 29*, the judge explained and states as follows:

[29] In an application for an order of mandamus, these five conditions are cumulative. All of them must be satisfied. In Koon Hoi Chow, supra, Sharma J enunciated the following principles:

(1) An order under s 44 is in its nature an order of mandamus. It is peremptory order of the court commanding somebody to do that which is was his clear legal duty to do. The applicant seeking such an order must have a legal right to the performance of such duty by the person against whom the order is sought;

(2) The prerequisites essential to the issue of an order under s 44 or of a mandamus are:

(a) *Whether the applicant in the High Court has a clear and specific legal right to the relief sought;*

(b) *Whether there is a duty imposed by law on the public officer(s);*

(c) Whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the public officer(s); and

(d) Whether the applicant has any remedy, other than by way of mandamus, for the enforcement of the right which has been denied to him.

[34] In the present case, the relief for mandamus sought by the applicant must fail as the requirement as mentioned above has not been fulfilled.

CONCLUSION

[35] Based on the abovestated reasons, the applicant's application for judicial review is dismissed with costs of RM5,000.

Application dismissed with costs of RM5,000.

Reported by Ashok Kumar